IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-5845

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

Petitioner

VS.

METROPOLITAN EDISON COMPANY, A Pennsylvania Utility Corporation

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ALAN LINDER, Esquire
EUGENE F. ZENOBI, Esquire
J. RICHARD GRAY, Esquire

TRI-COUNTY LEGAL SERVICES
53 North Duke Street
Lancaster, Pennsylvania 17602
(717) 397-4236

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the third circuit which has affirmed the judgment and order of the United States District Court for the middle district of Pennsylvania and has dismissed Petitioner's complaint for lack of subject matter jurisdiction.

OPINIONS BELOW

The opinion and judgment of the district court, dated June 30, 1972, dismissing Petitioner's complaint, appears in Appendix I and is reported at Jackson vs Metropolitan Edison Co., 348 F.Supp. 954 (M.D., Pa., 1972).

The opinion and judgment of the court of appeals, dated August 21, 1973, affirming the decision of the district court, appears in Appendix II. This opinion and judgment has now been reported at 483 F.2d 754 (3rd Cir., 1973).

JURISDICTION

The opinion and judgment of the court of appeals was entered August 21, 1973. By order dated September 27, 1973, that court allowed filing of Petitioner's Petition for Rehearing. By order dated October 25, 1973, that petition was denied without opinion.

This petition is timely filed pursuant to 28 U.S.C. §2101(c); and this court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Jurisdiction of the court below was based on 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4).

QUESTIONS PRESENTED

1. Whether a public utility corporation which is engaged in a public function, subject to substantial governmental regulation and control, beneficiary of a state authorized monopoly, and required to conform its

service and termination practices to a statutory standard of reasonableness and regulatory review acts under color of law in terminating residential utility service.

2. Whether residential utility service is an "entitlement" which can be terminated without due process of law.

STATUTORY AND REGULATORY PROVISIONS

The general managerial and operational function of Metropolitan Edison is subject to substantial governmental intervention and control under the Pennsylvania Public Utility Code, 66 P.S. §§452 et seq.; §§1101 et seq. For reasons of economy, Petitioner has not set forth this Code. However, the following statutes and regulations are pertinent to this case and are set out verbatim in Appendix III.

1. Pennsylvania Public Utility Code: 66 P.S.

   a) §452. Commission established
   b) §1101. Short title
   c) §1123. Certificates of convenience
   d) §1141. Rates to be just and reasonable
   e) §1142. Tariffs: filing and inspection
   f) §1144. Discrimination in rates
   g) §1171. Character of service and facilities
   h) §1172. Discrimination in service
   i) §1182. Standards of service and facilities
   j) §1183. Regulation of service
   k) §1121. Mandatory system of accounts
   l) §1241. Registration of securities to be issued or assumed
   m) §1271. Contracts for services
   n) §1341. Administrative authority of commission; regulations
   o) §1342. Commission to enforce act
   p) §1343. Enforcement proceedings by commission
   q) §1360. Contracts; power of commission to vary, reform or revise

2. Pennsylvania Public Utility Commission Tariff Regulations:

   a) Section II. Public Notice of Tariff Changes
   b) Section VIII. Discount for Prompt Payment and Penalties

3. Pennsylvania Public Utility Commission Electric Regulations:

   Rule 14 - Adjustment of Bills
   D. Access to Meters

4. Metropolitan Edison Company Electric Tariff:

   No. 41, Rule 15

5. Kansas Statutes Annotated

   KSA, §66-101

STATEMENT OF THE CASE

On October 18, 1971, Petitioner, Catherine Jackson, brought an action under the Civil Rights Act, 42 U.S.C. §1983, on behalf of herself and all others similarly situated against the Respondent Metropolitan Edison Company, a regulated Pennsylvania utility corporation, for damages, injunctive, and declaratory relief. Petitioner challenged the corporation's practice of summary termination of residential utility service for alleged non payment of a bill, without notice or opportunity for a prior hearing. Petitioner asserted that this challenged termination procedure, pursuant to the corporation's Electric Tariff No. 41, fails to comply with the requisites of procedural due process of law under the Fourteenth Amendment to the Constitution of the United States.

On October 18, 1971, a Temporary Restraining Order was granted and was continued by agreement of the parties. Following a hearing on a preliminary injunction, the Court granted the Defendant's motion to dismiss on June 30, 1972, for failure to state a cause of action, ruling that the Defendant did not act under color of law in terminating Petitioner's electricity. The court held that the Defendant's conduct was private and that the state was not directly involved in the termination action.

An appeal was filed with the Third Circuit on July 13, 1972, and the restraining order was continued on August 7, 1972. The Appellant argued that the lower court had erred in its narrow analysis of the issue of state action and that the state was, in fact, directly involved in the Defendant's conduct. Following oral argument on May 4, 1973, the Court of Appeals affirmed the decision of the District Court on August 21, 1973. The Court held that electricity was not a necessity of life and that the state was under no constitutional duty to furnish same. The Court further held that the lower court was correct in applying the narrow test of state action, and characterized the Defendant's conduct as private. A petition for rehearing before the court en banc was denied without opinion on October 25, 1973.

REASONS FOR GRANTING THE WRIT

At issue here is whether a public utility acts under color of law in terminating a customer's utility services for non payment of a disputed bill. Petitioner asserts that where utility service is provided by a public utility corporation which is engaged in a public function, is subject to substantial regulatory control, is the beneficiary of a state created monopoly, and is required to conform its service and termination practices to a statutory standard of reasonableness and regulatory review, the state's involvement is of such substance as to subject the corporation's affairs to the Fourteenth Amendment.

It is submitted that a writ of certiorari should be granted for the following reasons:

a) The Third Circuit has decided important federal questions in a manner inconsistant with decision of this court;

b) There is irreconcilable conflict among the Circuit Courts of Appeals regarding the substantial federal question of whether a public utility acts under color of law in terminating services for non payment of bills in the absence of due process of law; and

c) The Third Circuit has decided important federal questions which have not, but which should be decided by this court.

I. The Court of Appeals Has Decided Important Federal Questions In a Manner That is Inconsistant With Decisions of This Court

A. The Limited State Action Analysis of The Court of Appeals Conflicts With the Rule of This Court

The Court of Appeals has avoided a comprehensive analysis of the state action issue which would demonstrate the scope and extent of the Commonwealth's involvement with and participation in the affairs and challenged practices of Metropolitan Edison. Rather, the court has adopted a one dimensional analysis which narrowly focuses upon specific or obvious state authorization as its sole index of action under color of law. It has largely ignored the singular and cumulative effect of those several indices presented by Petitioner.

In the first instance, the Court of Appeals has disregarded the Commonwealth's affirmative assumption of responsibility for provision of utility

service and its designation of Metropolitan Edison as its exclusive agent to undertake this public function. Thus, ". . . when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations". Evans vs Newton, 382 U.S. 296, 29 ᶜ(1966). Once the state has assumed responsibility to oversee the provision of necessary services, those services rise to the level of a statutory entitlement, subject to due process requirements. Bell vs Burson, 402 U.S. 535 (1971). Thus, see Ihrke vs Northern States Power Co., 459 F.2d 566 (C.A. 8, 1972), cert. granted, vacated on mootness, 34 L.Ed.2d 72 (1973) where the court stated that the furnishing of electricity was the duty of the state. Also see Bowman vs City of Birmingham, 280 F.2d 531, 534 (C.A. 5, 1960).

The Court of Appeals noted that in Moose Lodge 107 vs Irvis, 407 U.S. 163 (1972) this Court required that for purposes of state action, the state must benefit from or in some way foster, encourage or support the conduct challenged. Also see Lucas vs Wisconsin Electric Co., 446 F.2d 638 (C.A. 7, 1972) cert. den. 34 L.Ed.2d. 696 (1973). In this regard, the Court of Appeals ignored the benefit derived by the state in this case. The Commonwealth has assumed responsibility to oversee the supply of utility services and therefore, in addition to the cost savings in not having to be the direct supplier of utility services, the state has an interest in seeing that service is provided at the lowest possible costs for its citizens. 66 P.S. §1171, §1141. Since relatively unfettered and summary termination procedures result in lower operating costs, and hence in lower rates, the state thereby directly benefits from the conduct challenged herein.

Similarly, the court's decision does not appreciate the significance of Metropolitan Edison's status as a state created monopoly. The corporation's exclusive franchise represents a fundamental market restructure from private to government control for the mutually beneficial purposes of assuring that adequate utility service is provided by an economically viable corporation. It is apparent that this state authorized monopoly causes the utility to enjoy

a favored economic position, and thus has the effect of encouraging summary termination of utility services, since a utility would be less prone to terminate services in a competitive field. The consequence of the exclusive franchise is the creation of an entity which is more akin to a government authority or government corporation than it is to a private, open market business corporation. It demonstrates an economic-operational interdependence between the Commonwealth and Metropolitan Edison which cannot be considered as so purely private as to fall without the scope of the Fourteenth Amendment. Burton vs Wilmington Parking Authority, 385 U.S. 715, 725 (1951).

More importantly, the Court of Appeals has failed to recognize that pervasive regulation distinguishes Metropolitan Edison from a typical business entity. Indeed, every significant aspect of the utility corporation's business is subject to comprehensive statutory and administrative regulation which is apart from and reaches well beyond that to which a private, open market business corporation is subject. 66 P.S. §452 et seq.; §1101 et seq., §§1123, 1141, 1142, 1144, 1171, 1172, 1182, 1183, 1211, 1241, 1271 and 1360. This substantial governmental intervention and control cannot, of course, be dismissed as without significant relevance to the issue of state action. Public Utility Commission vs Pollak, 343 U.S. 451, 462 (1952).

Finally, it must be noted that the Court of Appeals has erred in applying its own standard of state action, since governmental authorization for the termination practices of Metropolitan Edison exists herein. It should be noted that the corporation's termination regulation, Electric Tariff No. 41, is subject to a statutory standard of reasonableness. The Public Utility Code, 66 P.S. §1171, states inter alia:

> "Subject to the provisions of this act and the regulations or orders of the [Public Utility] Commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service . . ."

Together with the Public Utility Commission's formal submission requirements and its regulatory authority to review and approve proposed tariffs, this statute requires the utility to adopt and to comply with regulations acceptabl

to the Commission. See PUC Tariff Reg., No.II, and 66 P.S. §1341, 1342, 1343. Metropolitan Edison's Electric Tariff No. 41 has been so submitted and accepted by the Commission.

The sole Commission regulation specifically dealing with the termination of services is PUC Tariff Regulation, Section VIII, which provides that a public utility shall set forth in its Tariff a rule setting forth the "circumstances and conditions" under which services will be terminated. In its review of Metropolitan Edison's termination tariff above, the Commission did not order that the tariff also include a provision for notice and opportunity for a prior hearing as a condition prior to termination of services. In exercising its extensive authority above, the Commission has thereby assented to and has authorized the procedures challenged herein. Public Utility Commission vs Pollak, supra.

It is evident that these statutory and regulatory provisions directly and significantly involve the Commonwealth with the challenged practice. This scheme goes far beyond the simple notice-filing requirement noted by the court's decision, which was found to be insufficient for state action purposes in Kadlec vs Illinois Bell Telephone Co., 407 F.2d 624 (C.A. 7, 1969). In contrast, in the instant case, the Public Utility Commission is to define the standard of reasonableness, review proposed regulations and accept or reject those regulations. 66 P.S. §1171, 1141, 1341. Having required, reviewed, and accepted the termination tariff herein, the Commission has vested Tariff No. 41 with the apparent authority of the Commonwealth and thereby clothed the termination practices with the legitimacy of law. Reitman vs Mulkey, 387 U.S. 369 (1967). To dismiss the tariff as without government authorization because it was drafted and submitted by Metropolitan Edison rather than by the Commission is to assert a distinction without substance which has been rejected by the decision in Reitman.

In contrast to the narrow analysis of the Court of Appeals, this Court has repeatedly declared that the issue of action under color of law is not so limited; rather, it is a function of a range of factors.

> "While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action', on the other hand, frequently admits of no easy answer. 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.'" Moose Lodge No. 107 vs Irvis, 407 U.S. 163, 172 (1972), citing Burton vs Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

In each case, comprehensive consideration is given to every factor which reasonably bears upon the issue of government's relation to and involvement with challenged conduct. These include: (1) public function or governmental purpose. Marsh vs Alabama, 326 U.S. 501 (1946). Burton vs Wilmington Parking Authority, supra; (2) substantial governmental regulation, American Communication Ass'n. C.I.O. vs Douds, 369 U.S. 382 (1950). Public Utilities Commission vs Pollak, supra; (3) direct governmental authorization, encouragement, or enforcement, Public Utilities Commission vs Pollak, Evans vs Newton, supra, Reitman vs Mulkey, supra; and (4) state authorized monopoly or economic interdependence, Burton vs Wilmington Parking Authority, supra. In each case, it is both the singular and cumulative effect of these variables which demonstrates the scope and extent of government involvement in the conduct of an otherwise private entity.

Had the court of appeals followed the rule of this Court, it would have been compelled to the conclusion that the relation between the Commonwealth of Pennsylvania and Metropolitan Edison meets every established index of state action. The corporation is engaged in a public function, subject to substantial regulation, and beneficiary of a state created monopoly. Moreover, its challenged termination practice is directly subject to Pennsylvania statute and regulatory review by the Public Utility Commission. There exists that involvement and interdependence which this Court has characterized as symbiotic. Moose Lodge vs Irvis, supra.

B. The Ruling That Residential Utility Service Is Not A Protected Property Interest Conflicts With The Rule of This Court

The court of appeals has determined that residential utility service is merely a consumer convenience provided by a private business corporation, and is therefore, not to be protected by the Fourteenth Amendment. The court

concludes that there is no federal remedy for arbitrary termination of utility services and that it is a state problem to be resolved by the Public Utility Commission or the legislature.

In reaching this conclusion, the court has overlooked the essential fact that residential utility service must be provided by law to all consumers who meet reasonable eligibility requirements. A Pennsylvania utility corporation is not free to offer or withhold service; a basic condition of its certificate of convenience is that the corporation provide utility service to all eligible consumers within its service area. 66 P.S. §§1123, 1171, 1172. Residential utility service is thus an entitlement mandated by the Commonwealth. And like other entitlements, whether characterized as subsidies, licenses, certificates of convenience, public assistance, or unemployment compensation, it is a property interest, so recognized by this Court, and is to be protected by the Fourteenth Amendment. Goldberg vs Kelly, 397 U.S. 254, 262, n. 8 (1970) California Department of Human Resources vs Java, 462 U.S. 121 (1971); Bell vs Burson, 402 U.S. 535 (1971).

In addition, it is submitted that utility services are today a necessity of life. Such services are not a mere convenience or a de minimus interest. A consumer has no realistic alternatives to obtain life sustaining services when deprived of utility services. The interest in continued receipt of such services is a significant property interest subject to the protections of the Fourteenth Amendment. Fuentes vs Shevin, 407 U.S. 67 (1972); Sniadach vs Family Finance Corp., 395 U.S. 337 (1969).

C. The Rule That Metropolitan Edison's Termination Practice Satisfies Due Process of Law Conflicts With The Rule of This Court

The decision below has approved, as consistent with due process, Metropolitan Edison's practice of terminating utility service upon allegation of default and without notice and prior opportunity to contest. The court of appeals has legitimized a procedure whereby the consumer's only alternatives, in response to a computerized dunning notice, are to accept termination or to pay a disputed account. Short of litigation after payment, the consumer is denied all

opportunity to dispute the computer's version of the facts.

This procedure is in direct conflict with the rule of due process as definitively set forth in Fuentes vs Shevin, supra. That decision declares that no significant interest, whether characterized as a traditional property form or as an entitlement, can be denied without opportunity for a hearing. Sniadach vs Family Finance Corp., 395 U.S. 337 (1969); Goldberg vs Kelly, supra at 539; Boddie vs Connecticut, 401 U.S. 371, 379 (1971).

Courts have recently held that the continued receipt of utility services is a property right and an entitlement which is subject to due process protections Davis vs Weir, 328 F.Supp. 317 (N.D., Ga., 1971), 359 F.Supp. 1023 (N.D., Ga. 1973); Palmer vs Columbia Gas Co., 479 F.2d 153 (C.A., 6, 1973); Stanford vs Gas Service Co., 346 F.Supp. 717 (D. Kan., 1973); Bronson vs Consolidated Edison Co., 250 F.Supp. 443 (S.D.N.Y., 1972).

To the extent that entitlement to utility service is a significant property interest, this Court's decisions unquestionably require notice and opportunity for hearing prior to termination.

> "[No] later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "this Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." Fuentes vs Shevin, supra at 82, citing Stanley vs Illinois, 405 U.S. 645, 647 (1972).

II. The Court of Appeals Has Decided The Important Federal Question of 'whether a Public Utility Acts Under Color of Law in Terminating Utility Services for Non Payment of a Disputed Bill' In a Manner That is In Conflict With Decisions of Other Courts of Appeals

The decision of the Court of Appeals in this action follows the analysis of the 7th and 9th Circuits. See Kadlec vs Illinois Bell Telephone Co., supra; Martin vs Pacific Northwest Bell Telephone Co., 441 F.2d 116, 118 (C.A. 9, 1972) (dismissal of telephone company employee); Particular Cleaners, Inc. vs Commonwealth Edison Co., 457 F.2d 189, 191 (C.A. 7, 1972), cert. denied No. 71-1420, 34 L.Ed.2d 148 (Oct. 10, 1972) (security deposit requirement as a condition precedent to service); Lucas vs Wisconsin Electric Power Co., 466 F.2d 638, 644, 656 (C.A. 7, 1973), cert. denied, No. 72-5621, 34 L.Ed.2d. 696 (Jan. 8, 1973). Each of these decision has adopted the narrow approach of

the Kadlec opinion which requires affirmative governmental authorization for challenged conduct to support a finding of action under color of law. Each of these decisions has discounted the significance of other recognized indices of state action. Each has thus legitimized arbitrary practices by public utility corporations.

In contrast, Courts of Appeals for the 6th and 8th Circuits have adopted that broad, conprehensive analysis of state action which was utilized by this court in Burton vs Wilmington Parking Authority, supra, and reaffirmed in Moose Lodge vs Irvis, supra. See Ihrke vs Northern States Power Co., 459 F.2d 566, 568, 569 (C.A. 8, 1972) cert. granted, vacated, dismissed as moot, No. 72-28, 34 L.Ed.2d 72 (October 10, 1972); Palmer vs Columbia Gas of Ohio, Inc., supra. These decisions have recognized that the issue of action under color of law is a function of a range of variables which demonstrate the scope and extent of government involvement with challenged conduct. In finding state action, each opinion has considered both the singular and cumulative effect of public function, substantial regulation, government created monopoly, and authorization or review of utility regulations. In addition, the Palmer decision has affirmed the District Court requirement of prior notice and opportunity for review, following the rule of Fuentes vs Shevin, supra.

The decisions outlined here have raised substantial issues concerning the exte to which the Fourteenth Amendment is to govern the conduct of regulated public utility corporations. However, given these conflicting opinions, each of which asserts its compliance with Burton, Moose Lodge, Goldberg, or Fuentes, virtually all consumers, public utility corporations, and regulatory agencies alike are faced with uncertainty. Moreover, these divergent decisions have resulted in sharply contrasting residential utility service practices. Compare, for example, the policy of Metropolitan Edison, which has been approved by the Third Circuit with that mandated by the Sixth Circuit in Palmer vs Columbia Gas, supra.

It must be noted also that these conflicting opinions generate litigation in the Districts. Without a definitive declaration by this Court, the number of actions will continue to expand as advocates seek resolution of the recurring questions presented in this petition. See generally, Davis vs Weir, 328 F.Supp. 317, 321; 359 F.Supp. 1023, 1025 (N.D., Ga., 1973) [residential utility service furnished by a municipal utility is an entitlement to be protected by the Fourteenth Amendment]; Jackson vs Northern States Power Co., 343 F.Supp. 265, 266, (D. Minn., 1972) [preliminary injunction issued against termination without prior notice and opportunity to contest]; Stanford vs Gas Service Co., 346 F.Supp. 717, 720, 721 (D., Kan., 1972) [regulated utility corporation cannot terminate residential utility service without due process]; Hattell vs Public Servic Co. of Colorado, 350 F.Supp. 240, 245 (D., Colo., 1972) [motion to dismiss for lack of state action denied]; Bronson vs Consolidated Edison Co. of New York, Inc., 350 F.Supp. 443, 446, 447 (S.D.N.Y., 1972) [regulated utility corporation cannot terminate residential utility service without due process]; Freeman vs Frye, Civil No. C-72-350 (N.D., Calif., 31 Oct. 1972) [residential utility service is an entitlement to be protected by the Fourteenth Amendment]; Babcock vs Schaffhauser, Civil No. 15300 (D., Conn., December 7, 1972) [stipulated agreement whereby municipal utility agrees to provide prior notice and opportunity to contest proposed termination]; Hanrihan vs Boston Edison Co. Civil No. 72-3900 (D., Mass., filed January 15, 1973) [preliminary injunction issued against termination without prior notice and opportunity to contest proposed termination]; Buffington vs Gas Service Co., Civil No. 206643-2 (W.D., Mo., W.D April 4, 1973) [regulated utility corporation cannot terminate residential utility service without due process]: Allen vs DPU, City of Richmond, Civil No. 403-72-R (E.D., Va., April 11, 1973) [municipal utility cannot terminate residential utility service without due process].

It is interesting to note that a court has found state action to exist under

circumstances and facts very similar to the instant case.*

Finally, it is to be noted that the courts that have found state action to exist have also found that such action constitutes a denial of due process of law. See Palmer vs Columbia Gas Co., supra; Stanford vs Gas Service Co., supra; Bronson vs Consolidated Edison Co., supra and Davis vs Weir, supra.

III. The Court of Appeals Has Decided an Important Federal Question Not Yet Decided By This Court, i.e., The Extent To Which a Public Utility Is to be Subject to the Requirements of the Due Process Clause

The conflicting District and Circuit Court decisions in utility due process case demonstrate both uncertainty and reluctance to apply constitutional restraints to the consumer practices of an industry which, until recently has been uncritically viewed as a private business. However, in light of this Court's recent decisions which have materially altered traditional creditor practices, it is necessary and proper to reconsider that conventional wisdom. Given the importance of due process safeguards as fundamental to the rule of law, this Court should determine whether a utility's private corporate label is to isolate it from the mandate of due process. Simply stated, this Court is asked to determine the significance of substantial governmental intervention into and involvement with the affairs of an industry which has been formerly regarded as a private business.

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* In Stanford vs Gas Service Company, supra, the Court found state action to exist because the monopoly utility was performing a public function in the public interest, and was also subject to extensive governmental regulation. The fact that the utility company employees could not enter upon private property was deemed immaterial. More significantly, the statute pursuant to which the utility was authorized to sever service in that case was very similar to a provision of the Pennsylvania Public Utility Code, relied upon by the Appellant herein, 66 P.S. §1341. The pertinent Kansas statute provided:

> "Power, authority and jurisdiction. The state corporation commission is given full power, authority and jurisdiction to supervise and control the public utilities . . . and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction." KSA §66-101.

The comparable Pennsylvania statute provides:

> "Administrative authority of commission; regulation:
> The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within the Commonwealth. The commission may make such regulations, not inconsistant with the laws as may be necessary or proper in the exercise of its powers or for the performance of its duties under this act." 66 P.S. §1341.

Since 1969, four petitions, raising issues substantially similar to those herein have been denied or dismissed. Kadlec vs Illinois Bell Telephone Co., supra; Particular Cleaners vs Commonwealth Edison Co., supra; Ihrke vs Northern States Power Co., supra; Lucas vs Wisconsin Electric Co., supra. Given the importance of these questions and the uncertainty resulting from conflicting opinions below, a definitive review should be undertaken by this Court.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the decision of the Court of Appeal.

Respectfully submitted;

TRI-COUNTY LEGAL SERVICES

Alan Linder

Alan Linder, Esquire
Eugene F. Zenobi, Esquire
J. Richard Gray, Esquire

Attorneys for Petitioner

11/20/73

Date

APPENDIX I

Opinion of the United States District Court for the Middle District of Pennsylvania, Jackson vs Metropolitan Edison Company, 348 F.Supp. 954 (1972)

Catherine JACKSON, on behalf of Herself and All Others Similarly Situated

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania corporation.

Civ. No. 71-455.

United States District Court, M. D. Pennsylvania.

June 30, 1972.

Civil rights complaint in forma pauperis filed by customer on behalf of herself and all others similarly situated seeking money damages and declaratory relief against utility which allegedly violated customer's constitutional rights when electrical services to her home were summarily terminated without prior notice or hearing on the merits. On a defense motion to dismiss the complaint, the District Court, Nealon, J., held that since the utility had acted pursuant to its own regulations and out of a purely private, economic motive, namely, the nonpayment of past due bills, and since no state official participated in the practice complained of, nor was it alleged that the state requested or cooperated in the suspension of services, the customer failed to make a sufficient showing of state involvement in the complained of activity to prevail against a motion to dismiss for lack of action under color of state law, regardless of the state requirement that the utility clearly spell out any penalties to be imposed for nonpayment of bills.

Motion granted and complaint dismissed.

1. Civil Rights ⇐13.12(2)

A complaint which relies on statute in part providing that every person who, under color of state law, subjects any citizen of the United Sates to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable in an action at law or other proper proceeding must initially establish two elements; first, the conduct complained of must have been done under color of state law and, secondly, the conduct must deprive another of rights, privileges or immunities secured by the Constitution of the United States. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐13.5(2)

In determining the presence of state action in a particular case involving an alleged deprivation of rights, a court must examine the facts and circumstances to see if conduct that was formerly private has become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. 42 U.S.C.A. § 1983.

3. Federal Civil Procedure ⇐1781

Since utility, against which a complaint in forma pauperis was filed by customer who alleged that her constitutional rights had been violated when electrical services to her home were summarily terminated without prior notice, acted pursuant to its own regulations and out of a purely private, economic motive, namely, the nonpayment of bills, and since no state official participated in the activity, nor was it alleged that the state requested or cooperated in the suspension of services, the customer failed to make a sufficient showing of state involvement to prevail against a motion to dismiss for lack of action under color of state law, regardless of state requirement that a utility spell out any penalties to be imposed for nonpayment of bills. 42 U.S.C.A. § 1983; 66 P.S. Pa. §§ 1141, 1144, 1149, 1172, 1217, 1341, 1348.

Alan N. Linder, York, Pa., Richard A. Hesse, Director National Consumer Law Center, Chestnut Hill, Mass., for plaintiff.

Russell O'Malley, Irwin Schneider, Scranton, Pa., Ryan, Russell & McConaghy, Reading, Pa., for defendant.

J. Shane Creamer, Atty. Gen., Curtis Pontz, Deputy Atty. Gen., Dept. of Justice, Harrisburg, Pa., for Commonwealth of Pa.

MEMORANDUM AND ORDER

NEALON, District Judge.

On October 18, 1971, plaintiff filed a Civil Rights complaint in forma pauperis under 42 U.S.C. § 1983 [1] on behalf of herself and all others similarly situated seeking money damages and declaratory and injunctive relief against the defendant utility. Plaintiff alleges that her constitutional rights were violated when electrical services to her home were summarily terminated without prior notice or hearing on the merits. That same day a temporary restraining order was issued by this court enjoining defendant from terminating plaintiff's service until October 22, the day set for the hearing on the preliminary injunction. However, at the hearing on October 22, because of the short notice given to defendants, it was agreed between the parties that plaintiff's service was to be continued in order to allow defendant to respond to plaintiff's complaint. Subsequently, defendant moved to dismiss the complaint on the grounds that (1) the court lacks subject matter jurisdiction in that the defendant utility did not act under color of state law and (2) the complaint fails to state a cause of action on which relief can be granted. Numerous briefs having been filed, this motion is now before the court for decision.

In her complaint, plaintiff alleges that her service was terminated because she was unable to pay Metropolitan Edison for past due utility bills. Plaintiff disputes the validity of the bill in that she alleges that she is not wholly responsible

1. Any question as to the jurisdiction of this court under 28 U.S.C. § 1343 to the extent that it is alleged that a civil rights action lies only for alleged deprivation of personal rights as opposed to property rights was put to rest by the Supreme Court's recent decision in Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972).

for it since one James Dodson, a former co-occupant of the premises, is the party who originally subscribed for the services and had agreed to pay the bill. Finally, plaintiff contends that she has made several tenders of partial payments which were rejected by the utility company.

Metropolitan Edison's tariff, filed with the Pennsylvania Utility Commission, provides that the company, on reasonable notice, may discontinue utility services to a customer for nonpayment of utility bills.[2] However, the company's regulations do not require any type of hearing before the service is terminated. Plaintiff insists that the utility's failure to provide a hearing prior to termination constitutes a denial of due process of law. Plaintiff also alleges that because of her indigency she is unable to pay the bill and thus faces automatic termination, whereas a more affluent person could pay the challenged bill and then subsequently attack its validity. Such disparity of treatment, plaintiff claims, is in violation of the equal protection clause of the Fourteenth Amendment.

[1] It is well settled that a complaint which relies on 42 U.S.C. § 1983 must initially establish two elements. First, the conduct complained of must have been done under color of state law. Private action, however wrongful, cannot form the basis for relief under § 1983. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); United States v. Price, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Secondly, the conduct complained of must deprive another of rights, privileges, or immunities secured by the Constitution of the United States. See Adickes, *supra*. It is defendant's position in its motion to dismiss that the complaint is fatally defective as to one of these elements, since they insist that Metropolitan Edison did not act under "color of state law" within the meaning of § 1983.

Although the core concept of "state action" has been frequently discussed by the Supreme Court, an exact definition has never been formulated,

> ". . . to fashion and apply a precise formula for recognition of state responsibility . . . is an 'impossible task' which 'This Court has never attempted' . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961).

[2] Thus, in determining the presence of state action in a particular case, a court must examine the facts and circumstances of that case to see if

> "(c)onduct that is formerly 'private' (has) become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."

Evans v. Newton, 382 U.S. 296, 299, 86 S.Ct. 486, 488, 15 L.Ed.2d 373 (1966).

In essence, the factors upon which plaintiff relies in establishing state action are that (a) the Commonwealth of Pennsylvania has granted Metropolitan Edison, as a privately-owned public utility, a monopoly in the distribution of electricity in the York area and (b) its daily operation is subject to the close supervision and regulation of the Pennsylvania Public Utility Commission. Specifically, plaintiff cites the P.U.C.'s power (1) to regulate and review rates established by the utility;[3] (2) to establish regulations necessary in the supervision of a utility doing business within Pennsylvania;[4] (3) to require that all rules and regulations adopted by the utilities themselves be subject to the approval of the P.U.C.;[5] (4) to provide for an inspection and access to any and all facilities and records of public utilities which the Commission deems necessary;[6] and (5) to prohibit discriminatory practices in rates[7] and services,[8] as demonstrating that the operation of Metropolitan Edison "is so intertwined with the state as to make it inseparable from it." Evans v. Newton, *supra* at 299, 86 S.Ct. 486. In addition, plaintiff maintains that the state is involved with the very activity complained of, i. e. the termination of service, in that Pennsylvania P.U.C. Tariff Regs. VIII provides that

> "Every public utility that [imposes] penalties upon its customers for failure to pay bills promptly shall provide in its filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed . . ."

On the other hand, defendant argues that the overwhelming weight of authority has held that merely because a private corporation, such as Metropolitan Edison, enjoys an economic monopoly which is supervised and controlled by a state-wide regulatory body does not necessarily bring its *every act* within the purview of Section 1983. *See e. g.* Martin v. Pacific Northwest Bell Telephone Co., 441 F.2d 1116 (9th Cir. 1971); Kadlec v. Illinois Bell Telephone Co., 407 F.2d 624 (7th Cir. 1969); Lucas v. Wisconsin Electric Power Co., 322 F.Supp. 337 (E.D.Wis.1970); Taglianetti v. New England Tel and Tel. Co., 81 R.I. 351, 103 A.2d 67 (1954). Defendant contends that in order for state action to exist in the instant case "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with *the activity that caused the injury.*" (emphasis added) *See* Martin v. Pacific Northwest Bell Telephone Co., *supra*, 441 F.2d at 1118. Kadlec v. Illinois Bell Telephone Co., *supra Cf.* Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).[9] I agree.

In Kadlec v. Illinois Bell Telephone Co., *supra*, perhaps the leading case dealing with the question of state action as applied to a regulated public utility, the Seventh Circuit Court of Appeals affirmed a dismissal of a Civil Rights complaint against a telephone company which charged that the company had unconstitutionally terminated certain of plaintiff's commercial telephone services, finding that the termination had not been done under color of state law. The Court held that the acts of the telephone company, taken pursuant to its own regulations, could not be regarded as acts done under color of law simply because the company's regulations had been filed with and approved by an agency of the state. The court elaborated:

> "Motivated by purely private economic interests and pursuant to its *own regulations*, Illinois Bell terminated plaintiffs' Call-Pak service. The only apparent state connection with the termination rests in the fact that defendant company filed its regulations with state authorities; the state in no sense benefited from, encouraged, re-

2. In Tariff No. 41 of the Metropolitan Edison Company, filed with the Pennsylvania Public Utility Commission, Rule 15 provides: "Company reserves the right to discontinue its service on reasonable notice and to remove the equipment in case of nonpayment of bill of violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations;

3. 66 P.S. §§ 1141, 1144, 1149.

4. 66 P.S. § 1341.

5. 66 P.S. § 1172.

6. 66 P.S. §§ 1217, 1348.

7. 66 P.S. § 1144.

8. 66 P.S. § 1172.

9. Support for this contention is found in Burton v. Wilmington Parking Authority, *supra*, where the court held that "(t)he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a *joint participant in the challenged activity*, which, on that account, cannot be considered to have been so 'purely private' as to fall within the scope of the Fourteenth Amendment." (emphasis supplied)

quested or co-operated in this suspension of service."

". . . . Here, the nexus between the state and defendant's conduct was not sufficient to maintain an action under § 1983."

407 F.2d at 626.[10]

[3] The only apparent state involvement with the activity complained of here is in Tariff Reg. VIII of the Pennsylvania P.U.C. which requires that every utility that imposes penalties on its customers for failure to pay bills promptly shall clearly set forth in their tariff the exact conditions under which the penalties are to be imposed. However, the mere requirement that Metropolitan Edison clearly spell out any penalties it will impose for non-payment of bills does not clothe Metropolitan Edison with state authority nor transform the defendant's regulations into acts of the state.[11] Rather, the purpose of Tariff Reg. VIII is to insure that public utilities inform their patrons of any possible penalty for failing to pay their bills. As in *Kadlec*, defendant here acted pursuant to its own regulations and out of a purely private, economic motive. No state official participated in the practice complained of, nor is it alleged that the state requested or co-operated in the suspension of service. Thus, plaintiff has failed to make a sufficient showing of state involvement in the activity complained of to prevail against defendant's motion to dismiss. Accordingly, the complaint will be dismissed.

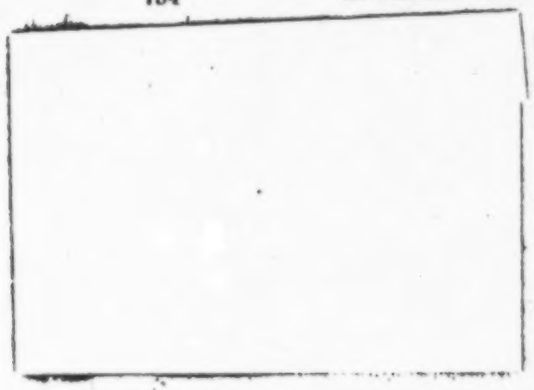
Because of the view I take of this case, it will be unnecessary to consider the merits of plaintiff's contention that her services were terminated in violation of her constitutional rights. I note in passing, however, that plaintiff submitted no evidence indicating disparity of treatment which constituted a denial of equal protection of the law.

10. More recently, in another context, the Supreme Court considered the question of whether a state's regulatory scheme constituted state action and noted that the Court has never held that state regulation in any degree whatever would implicate the state in private conduct but would require significant involvement in the proscribed activity. The Court stated that "(h)owever detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination . . . (n)or can it be said to make the State in any realistic sense a partner or even a joint venturer in the Club's enterprise". Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-177, 92 S.Ct. 1965, 1973, 32 L.Ed.2d 627 (1972).

11. This does not mean, of course, that the State may not, by regulation, require a hearing before service may be terminated by a public utility. While such a regulation may be laudable, it is not constitutionally required.

APPENDIX II

Opinion of the United States Court of Appeals for the Third Circuit, Jackson vs Metropolitan Edison Company, Civil No. 72-1745 (21 August 1973) 483 F.2d 754 (3rd Cir., 1973)



Catherine JACKSON, on behalf of herself and all others similarly situated, Appellant,

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania corporation.

No. 72-1745.

United States Court of Appeals, Third Circuit.

Argued May 4, 1973.

Decided Aug. 21, 1973.

Civil rights complaint by customer on behalf of herself and all others similarly situated seeking money damages and declaratory relief against utility which allegedly violated customer's constitutional rights when electrical service to her home was summarily terminated without prior notice or hearing on the merits. The United States District Court for the Middle District of Pennsylvania, William J. Nealon, Jr., J., dismissed the complaint, 348 F.Supp. 954, and appeal was taken. The Court of Appeals, Weis, Circuit Judge, held that since utility acted pursuant to its own regulations and out of a purely private economic motive, namely the nonpayment of bills, and since no state official participated in the activity, customer failed to make a sufficient showing of state involvement to prevail against motion to dismiss for lack of action under color of state law.

Affirmed.

James Hunter, III, Circuit Judge, was present at argument but did not participate in the decision.

1. Civil Rights ⇨13.5(2)

Generally there may be a finding of "state action or action under color of state law," within meaning of civil rights statute, when a private party's action occurred in conjunction with the business in which the state may be considered a partner or joint venturer in a profit-making field, when a state statute or custom or usage compels the result, when a state agency affirmatively orders or specifically approves the activity in the course of its regulatory rule making, or when a private agency in effect is acting on behalf of and furnishing a typical government service. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇨296(1)

Procedure requiring utility customer to sue for refund after payment of amount claimed to be due the utility, in order to avoid shutoff of service does not violate due process. U.S.C.A.Const. Amend. 14.

3. Corporations ⇨382½

The right to receive utility service does not rise to the level of a constitutional right or an entitlement from the state.

4. Corporations ⇨382½

Right of a customer to receive utility service pending resolution of a dispute between customer and utility is not protected by the Constitution.

5. Federal Civil Procedure ⇨1781

Since utility, against which complaint was filed by customer who alleged that her constitutional rights had been violated when electrical service to her home was summarily terminated without prior notice, acted pursuant to its own regulations and out of a purely private, economic motive, namely the nonpayment of bills, and since no state official participated in the activity, nor was it alleged that state requested or cooperated in the suspension of services, customer failed to make a sufficient showing of state involvement to prevail against a motion to dismiss for lack of action under color of state law. 42 U.S.C.A. § 1983; 66 P.S.Pa. § 1101 et seq.

Alan N. Linder, Tri-County Legal Services, York, Pa., for appellant.

Russell J. O'Malley, Paul A. Barrett, Nogi, O'Malley & Harris, Scranton, Pa., for appellee (Samuel B. Russell, Ryan, Russell & McConagley, Reading, Pa., of counsel).

James R. Adams, Edward J. Weintraub, Deputy Attys. Gen., for Com. of Pa., as amicus curiae.

Edward J. Dailey, National Consumer Law Center, Inc. as amicus curiae.

Jonathan M. Stein, I. David Pincus, David J. Ackerman, Philadelphia, Pa., Fellowship Commission's Committee on Consumer and Citizen Complaints, as amicus curiae.

Before HUNTER * and WEIS, Circuit Judges, and SCALERA, District Judge.

OPINION OF THE COURT

WEIS, Circuit Judge.

Whether the Civil Rights Act was violated when an electric utility shut off service to its customer is the issue to be decided in this case.

The defendant is a privately owned and operated Pennsylvania corporation, granted a monopoly to deliver electricity to the populace in the area of York, Pennsylvania. Like similar utilities in Pennsylvania, it is subject to the provisions of the Public Utility Code [1] and the regulations of the Public Utility Commission authorized by the Act.

The plaintiff was a residential customer of the Metropolitan Edison Company and in October of 1971 was claimed to have owed the defendant for past due bills. She disputed the validity of the charges, asserting that a former co-occupant of the premises was responsible for the amount due. Despite several tenders by the plaintiff of partial payments, the defendant terminated service on October 11, 1971 by disconnecting the line on the company's utility pole on the street near the plaintiff's house. The plaintiff then filed suit under the Civil Rights Act, 43 U.S.C. § 1983,[2] asking both damages and injunctive relief.

The district court held an evidentiary hearing on the request for a preliminary injunction. The plaintiff testified that on an occasion about a year previously when the electricity had been disconnected, she left her home for about 45 minutes to telephone the utility and when she returned, the power had been restored. She admitted not receiving bills in the ensuing year but claimed that one Dodson, the co-occupant of the house, had received and paid monthly statements from the defendant.

Although Dodson left the premises about August, 1971, the plaintiff admitted that no bills were received at her home thereafter. She testified that on October 6, 1971 a representative of Metropolitan came to the house inquiring

* Judge Hunter was present at the argument of this case but did not participate in the decision.

[1] 66 Purdon's (Pennsylvania) Statutes §§ 1101 *et seq.*

[2] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

about Dodson and on the following day another employee looked at the meter and told her that somebody had tampered with it. The plaintiff then asked that service be reinstated in the name of Robert Jackson. At the hearing she admitted that this was in fact her 12 year old son.

At the conclusion of the plaintiff's testimony and after the filing of briefs, the district court dismissed the case because there was not "a sufficient showing of state involvement in the complained of activity . . . ."[3]

The plaintiff asserts that the defendant's action in arbitrarily terminating service to her was under color of state law because:

1. As a utility, the defendant was closely regulated by the Commonwealth of Pennsylvania;
2. In supplying electricity, Metropolitan Edison was performing a governmental function;
3. The defendant was either acting as an agent for the state or a joint participant with it; and
4. The failure to act by the state amounted to "state action".

Litigation between utilities and their customers based on § 1983 has been the subject of decisions in the Courts of Appeals of the Eighth, Seventh, and Sixth Circuits, as well as a number of district courts. While on the facts the situations in the reported cases are capable of distinction, an objective appraisal might suggest that the differing results represent a continued uncertainty as to the application of the "color of state law" test.

The Supreme Court has frankly admitted the difficulty of drawing guidelines, and in Moose Lodge 107 v. Irvis, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972), Justice Rehnquist wrote:

"While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'State action,' on the other hand, frequently admits of no easy answer. 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.'"

While the *Moose* case was concerned with a private club rather than a utility, the following quote is helpful:

"The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in the *Civil Rights Cases*, *supra*, and adhered to in subsequent decisions."

The Supreme Court went on the discuss the multiform variety of control that the state exercised over the holder of a liquor license which the district court had described as "pervasive" and went on to say:

"However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise."

The Court thus recognizes the importance of a connection between the state regulation and the proscribed conduct.

Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), presented a situation where the Court felt that a state agency which leased premises to a restauranteur became a joint-venturer or partner, in a sense, in the enterprise and therefore shared in the discriminatory policies of

3. 348 F.Supp. 954 (M.D.Pa.1972).

the private concern. Furthermore, in that case the plaintiff could point to a specific state statute which was said to permit the offending conduct.

Adickes v. Kress, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), also was concerned with conduct of a private enterprise said to be in violation of § 1983. The Court there pointed out that the involvement of a policeman in a conspiracy situation provides the necessary ingredient of state action in a claim of violation of the Fourteenth Amendment, whether or not the actions of the officer were officially authorized. The Court also said:

"Whatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983 . . . we think it essential that he act with knowledge of and pursuant to the statute." (At pp. 161, 162, f.n. 23, 90 S.Ct. at pp. 1598, 1611)

The Court noted also that a state is responsible for the discriminatory act of a private party if the state by its law has compelled the act.

Public Utility Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1952), found "state" involvement where the Commission after conducting hearings affirmatively approved the action which was held to be objectionable. The Court said very specifically and clearly:

". . . we do not rely on the mere fact that Capital Transit operates a public utility . . . Nor do we rely upon the fact that . . . Capital Transit now enjoys a substantial monopoly of street railway . . ."

Pollak, therefore, is not authority for the holding that the actions of a public utility which enjoys a monopoly, *ipso facto*, are those of a state agency, nor does it hold that all activities conducted under the auspices of a utility regulatory body satisfy the "color of state law" test.

[1] Though it is difficult to summarize in this complex field and without intending to be all inclusive, it may be said generally that there may be a finding of state action or action under color of state law:[4]

1. When a private party's action occurred in conjunction with a business in which the state may be considered a partner or joint venturer in a profit making field (Burton v. Wilmington, *supra*); or
2. when a state statute or custom or usage compels the result (Adickes v. Kress, *supra*); or
3. when a state agency affirmatively orders or specifically approves the activity in the course of its regulatory rule making (Public Utility Commission v. Pollak, *supra*); or
4. when a private agency in effect is acting on behalf of and furnishing a typical government service (Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946)).

A brief discussion of the regulatory plan under which the defendant Metropolitan operates is helpful in deciding whether it falls within any of the categories outlined.

The rates which the defendant charges its customers are regulated by and must be approved by the Public Utility Commission. Additionally, the Commission is empowered to issue regulations necessary for supervision of utilities doing business in Pennsylvania, including provisions for inspection and access to facilities and records of the company as the Commission thinks necessary. The Commission is charged with prohibiting discriminatory practices in rates and services, and all rules and reg-

4. While it has been suggested that "state action" and "action under color of state law" are synonymous, U. S. v. Price, 383 U.S. 780, 794, f.n. 7, 86 S.Ct. 1152, 16 L.Ed. 2d 267 (1966), at least one court has indicated its belief that the "color of state law" test may be more demanding. Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972).

ulations of the utilities are subject to its approval.

As part of the rate-setting procedure, the utility must file a tariff with the Commission in compliance with its rules. The Commission Regulation on Tariffs, § VIII, provides that:

"Every public utility that [imposes] penalties upon its customers for failure to pay bills promptly shall provide in its filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed . . ."

Pursuant to the regulation, the defendant filed in Tariff No. 41, its Rule 15 (issued April 30, 1971, effective June 30, 1971):

"Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of non-payment of bills or violation of the Pennsylvania Utility Commission's or Company's rules and regulations; or, without notice, for abuse, fraud, or tampering with the connections, meters, or other equipment of company."

Since the record is silent on the point, we assume that no objection was raised to this particular provision of the tariff and, therefore, there was no hearing before the PUC which would have required affirmative action by that body such as occurred in the Pollak case.

While the tariff purports to give the company the right of re-entry upon the customer's premises for purpose of removing its equipment after termination of service, it seems clear from the record that such action was not taken in this case. The service was disconnected by the defendant at its pole, some distance removed from the home of the plaintiff.

Thus the action of the company in terminating service in this case was taken pursuant to its own regulations using its own personnel without entering onto the customer's private property, without utilizing any state statute or regulation permitting re-entry on the customer's premises, and without any specific direction or authorization of the regulatory body.

The factual background in this case is quite similar to that in Lucas v. Wisconsin Electric Power Company, 466 F.2d 638 (7th Cir. 1972), cert. denied, 409 U.S. 1114, 93 S.Ct. 928, 34 L.Ed.2d 696 (1973), where the Court of Appeals for the Seventh Circuit, sitting en banc, held that there had not been action under color of state law and said:

"The 'under color of' provision encompasses only such private conduct as is supported by state action. That support may take various forms, but it is quite clear that a private person does not act under color of state law unless he derives some 'aid, comfort, or incentive,' either real or apparent, from the state. Absent such affirmative support, the statute is inapplicable to private conduct.

"We believe that affirmative support must be significant, measured either by its contribution to the effectiveness of defendant's conduct, or perhaps by its defiance of conflicting national policy, to bring the statute into play (466 F.2d pp. 655, 656). . . . we believe the significance of that support must be evaluated to determine whether it brings § 1983 into play; otherwise the federal statute would soon supersede vast areas of state administrative regulation." (466 F.2d p. 657)

The Court concluded that the monopoly factor did not in a practical way deprive the customer of an effective remedy nor did it add the necessary state support to private conduct so as to transform an issue of state regulatory policy into a civil rights case.

The Court's action thus affirmed its earlier ruling in Kadlec v. Illinois Bell Telephone, 407 F.2d 624 (7th Cir. 1969), cert. denied, 396 U.S. 846, 90 S.Ct. 90, 24 L.Ed.2d 95 and was consistent with Particular Cleaners v. Commonwealth Edison, 457 F.2d 189 (7th Cir. 1972). *See also*, Martin v. Pacific Northwest

Bell Telephone Co., 441 F.2d 1116 (9th Cir. 1971), where that Court said:

"The fact that a private corporation, such as Pacific Bell, enjoys an economic monopoly which is protected and regulated by the state does not necessarily bring its every act within the purview of Section 1983. [citation], for as well stated in Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968), 'the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury.'"

In Palmer v. Columbia Gas Company, 479 F.2d 153 (1973), a panel of the Court of Appeals for the Sixth Circuit came to a contrary conclusion in a situation where the utility availed itself of a right of entry on the customer's property, that privilege having been granted by a state statute.[5]

The color of state law test was found to have been satisfied in Ihrke v. Northern States Power Company, 459 F.2d 566 (8th Cir. 1972), reversed on mootness, 409 U.S. 815, 93 S.Ct. 66, 34 L.Ed. 2d 72 (1972), where the city which regulated the utility also received 5% of the company's gross earnings. In that instance it might well be said that while the city did not collect the utility bills, it shared directly in them and to some extent was a joint venturer with the power company.[6]

While the Supreme Court in the *Moose Lodge* case refused to prohibit racial discrimination in a private club setting finding no state action in the extensive regulation of the Liquor Control Board, a differing result was reached in *Burton, supra*, where a public restaurant was involved but less state control was evident. It may well be that the underlying reasoning for the differing results in the two cases is that in *Moose Lodge* the national prohibition against racial discrimination had come into conflict with the fundamental right of free association, while in *Burton* the tension arose between discrimination and the freedom to operate a business which should have been open to the public at large. In this analysis, it is not at all clear that the result in *Moose Lodge* would not have been different had the discriminating defendant been a public utility rather than a private club.

It is important, therefore, that the issues here be considered not only on the premise of color of state law but that there be an examination and evaluation of the underlying federal rights of the parties, particularly those which the plaintiff espouses.[7] While the plaintiff and *amici* speak of utility service as being "indispensable to life and health" and termination of those services as depriving her of the very "means and necessities of life," we think those characterizations are extreme and serve only to becloud the real issues.[8]

Granted that in today's urban society the supply of electricity to a home does much to make life more comfortable and

5. The Lucas court placed emphasis upon the lack of entry upon the resident's premises and implied that its decision might have been different had the utility availed itself of the state statute to enter the customer's home in order to cut off the power.

6. *See also* Stanford v. Gas Service Co., 346 F.Supp. 717 (D.C.Kan.1972); Hattell v. Public Service Co. of Colorado, 350 F.Supp. 210 (D.C.Colo.1972); Bronson v. Consolidated Edison, 350 F.Supp. 413 (S.D.N.Y. 1972). The fact situations in many of the cases present instances of callous and overbearing conduct by personnel of large utilities, familiar examples of the abuse of authority by those who have little of it. Decisions in favor of the plaintiff in such instances carry strong emotional appeal but are not necessarily persuasive legal authority on the applicability of § 1983. We are not convinced that state courts or the PUC in Pennsylvania would not issue appropriate orders in such outrageous situations as those detailed in Bronson and Palmer, *supra*.

7. *See* Williams, The Twilight of State Action, 41 Texas L.R. 347 (1963).

8. *See* Abernathy, Expansion of the State Action Concept under the Fourteenth Amendment, 43 Cornell Law Quarterly 375, 405 (1958).

convenient, its absence in the usual situation does not pose an immediate threat to the life of the occupants. The fact that people, even today, manage to carry on their lives in isolated areas without electricity is proof enough of that.

There is a clear distinction between depriving a community of power where disastrous results might occur if hospital, water purification, and communications facilities were interrupted and the situation in a dwelling when the absence of electrical energy would require manual operation of furnace controls, illumination by kerosene lantern, or refrigeration by ice. We do not minimize the inconvenience of the absence of electrical service or deny that special circumstances may result in serious consequences but simply indicate doubt with the flat assertion that failure to provide this form of energy to a home is a threat to life itself. It is probably more accurate to say that the service is essential to the kind of life we are accustomed to, particularly in an urban society.

Furthermore, as convenient as this utility service is, as desirable as its continuation may be, and as dependent on it we may believe ourselves to be because of its availability and benefits, the fact remains that as of this time at least, the state is not obligated to furnish electricity without charge to its citizens.[9] Those who wish to avail themselves of it must pay for it.[10]

This premise the plaintiff does not dispute here, nor does she deny that if it is proved that she is mistaken in her sition on the contested bill, she must it or do without electricity.

Clearly then, the right for which plaintiff now contends is to continue receive the service and, we assume, for it on a current basis until such t as a decision can be had on the dispu items.

The utility's response is that plaintiff may pay the contested cha and then claim for a refund. This p ess, it is assumed, may be handled inf mally and perhaps without the neces of going to court.[11] Though not expl itly stated as such, there is an under ing premise in plaintiff's position t because her income is limited to p ments made by the Department of Pu lic Welfare, the refund claim process not a practical alternative to her. If are to accede to this contention thou it should apply to every indigent pers not only as to past due bills, but curre ones as well. While there may be arg ment that this would be a socially des able development,[12] it has not yet be suggested as a constitutionally mandat one or one compelled by congressio enactment.

Plaintiff also asserts that she shou be given reasonable notice before h service is terminated. But the defen ant has already agreed with that prop sition—its tariff provides that "reaso able notice must be given befo termination."[13] She thus has been give that right which can be enforced in th state courts or by the Public Utilit Commission—at certainly no more c

9. Shelton, The Shutoff of Utility Services for the Poor, 46 Washington L.R. 745, comments that the state of Washington by constitution and statute permits free service to indigents, but apparently there are no requirements that it in fact be done.

10. *See* the discussion in Michelman, The Supreme Court 1968 Term, Foreward: On Protecting the Poor Through The Fourteenth Amendment, 83 Harvard L.R. 7 (1969).

11. While it has been asserted that few of these cases result in litigation because of costs and the small amount involved, we point out that the district magistrates Pennsylvania and the Small Claims Tri nals of the Common Pleas Court offer portunities for the customer to present case at little expense and without the nec sity of employing counsel.

12. *See* Shelton, *supra*, f. n. 9.

13. Plaintiff has not raised in brief or arg ment any objection to the provision in th tariff reserving the right to discontin without notice in the event that there ha been tampering with the meter by the cu tomer. Since there is no evidence that it i applicable here, we do not consider it.

pense or inconvenience than resort to the district court required.

Again, we note that the termination of the electricity did not occur until after the plaintiff had been contacted by two representatives of the defendant and had been made aware of irregularities in her account.

[2] Essentially then, if the plaintiff is to prevail, she must establish that the procedure of suing for refund after payment of the amount claimed to be due is a violation of due process.

While this method of resolving disputes may be harsh and undesirable, we cannot say that it is unconstitutional. Flora v. United States, 362 U.S. 145, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960), discusses the history and procedures of collection of revenues due the United States which in many instances involves payment of the tax first and then filing a suit for refund. *See also* Great Lakes Dredge & Dock Company v. Huffman, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943), where the Court did not disapprove a similar procedure in a state tax collection matter.

There has never been any indication from the Supreme Court that this procedure does not comport with constitutional requirement of due process. The reason given for such drastic procedures, that is, that the revenue must be collected in order to keep the government in operation, is the very same argument the utilities invoke as grounds for requirement of payment before further service is rendered.

[3] Plaintiff maintains, also, that because of its importance to everyday living, the right to receive utility service rises to the level of a constitutional right or an entitlement from the state.[14] She cites Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), as expository of the doctrine that a person may not be deprived of a privilege or right by the state without a hearing. But while that case provides that the state is limited in the procedures that it may use to revoke or suspend an existing driver's license, there is no compulsion to issue one without payment of the customary fee. Moreover, we think that the wrong criterion has been applied. All of life's vital concerns have not been entrusted to the central government, and many, if not most, repose in the state or its agencies. Even so fundamental a human requirement as that of decent shelter has been said not to have a specific constitutional guarantee. Thus, in Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972), the Court said:

"We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement."

The *Lindsey* case dealt with a summary form of eviction used in Oregon which required payment by the tenant in order to maintain possession and required that any defenses other than payment be reserved to a separate suit. Thus, it is akin to the theory used by the utility in this case, that is, pay first

14. The "entitlement" cases generally deal with a privilege or right conferred by the state of something which it alone can grant, e. g., in Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), only the state, not a private company, can issue a driver's license; only a state by appropriation and legislative action may administer and disburse welfare benefits, Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970). Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1971), was concerned with the effect of state statutes on the owner's right of possession of personalty. We do not believe that there is a property right to be furnished utility service without payment.

and litigate later. The Supreme Court in the *Lindsey* case found no constitutional objection to such a procedure.[18]

So, too, in San Antonio Independent School District v. Rodriguez et al., 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), a case dealing with the admittedly important role of education in our society, the Court said:

> "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."

And so, although the plaintiff's position has strong appeal, that is not enough to establish a constitutional basis. We must be alert to the fact that in granting a federal remedy to what is essentially a state problem, there is a further extension of the power of the central government. Intervention is justified in some instances and indeed may be an absolute necessity at times, but such action should not be taken without recognizing the effect there may be upon the concept espoused by the framers of the Constitution that one of the best ways to prevent excessive and abusive government is to disperse its power among many entities and at various levels.

A reluctance, therefore, to enlarge the authority of the federal courts should not simply be viewed as a lack of appreciation for the rights of the individual but, rather, as an indication of concern for the most appropriate method of maintaining the proper balance between governmental power and the citizen's liberties.

Of course, much depends upon the circumstances, and in this case we find no overriding justification for utilization of the Civil Rights Act to intrude the federal courts into what is and should remain a state regulatory process.

[4] Simply stated, we do not find that a right to receive utility service pending resolution of a dispute between a customer and the company is protected by the Constitution of the United States.

[5] Thus, although we would find that there is no federally protected right involved here, we agree with the approach of the district court in applying a narrow view of the "color of state law" test in the weighing and sifting process in the circumstances of this case.[19] We find no error in the decision of the learned District Judge, and the judgment of the District Court, therefore, will be affirmed.

18. The fact that we find no constitutional prohibition to this procedure does not mean that we approve it or recommend it. If we were free to substitute our judgment for that of the PUC and the state legislature, we would require the utility to continue service on payment of current charges while the disputed matters are litigated and allow a time payment arrangement for financially

APPENDIX III

Statutes and Regulations

1. Pennsylvania Public Utility Code

Purden's Pennsylvania Statutes, Title 66

a. §452. Commission established; terms of office; qualifications of members; chairman; compensation; quorum

(a) A commission to be known as the Pennsylvania Public Utility Commission is hereby created. The commission shall consist of five members who shall be appointed by the Governor, by and with the advice and consent of two-thirds of all the members of the Senate. The commissioners first appointed under this act, shall continue in office for terms of two, four, six, eight, and ten years, respectively, from the effective date of this act, but their successors shall each be appointed for a term of ten years. No commissioner, upon the expiration of his term as aforesaid, shall continue to hold office until his successor shall be duly appointed or shall be qualified. Each commissioner, at the time of his appointment and qualification, shall be a resident of the Commonwealth of Pennsylvania, and shall have been a qualified elector therein for a period of at least one year next proceding his appointment, and shall also be not less than thirty years of age.

(b) A member designated by the Governor shall be the chairman of the commission during such member's term of office. When present, the chairman shall preside at all meetings, but in his absence a member, designated by the chairman, shall preside and shall exercise, for the time being, all the powers of the chairman.

(c) Each of the commissioners shall receive an annual salary of nineteen thousand dollars ($19,000.00), except the chairman, who shall receive an annual salary of twenty thousand dollars ($20,000.00).

(d) Three members of the commission shall constitute a quorum who, for all purposes, including the making of any order or the ratification of any act done or order made by one or more of the commissioners, must act unanimously. 1937, March 31, P.L. 160, §1; 1943, March 31, P.L. 32, §1; 1949, March 31, P.L. 369, No. 32, §1, 1957, July 16, P.L. 949, No. 408, §1.

b. §1101. Short title

This Act shall be known and may be cited as the "Public Utility Law". 1937, May 28, P.L. 1053, Art. I §1.

c. §1123. Certificates of Convenience

(a) Every application for a certificate of public convenience shall be made to the commission in writing, be verified by oath or affirmation, and be in such form, and contain such information, as the commission may require by its regulations. A certificate of public convenience shall be granted by order of the commission, only if and when the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accomodation, convenience, or safety of the public; and the commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable. In every case, the commission shall make a finding or determination in writing, stating whether or not its approval is granted. Any holder of a certificate of public convenience, exercising the authority conferred by such certificate, shall be deemed to have waived any and all objections to the terms and conditions of such certificate.

(b) For the purpose of enabling the Commission to make such findings or determinations, it shall hold such hearings, which shall be public, and, before or after such hearing, it may make such inquiries, physical examinations and estimates of cost, as it may deem necessary or proper in enabling it to reach a finding or determination.

d. §1141. Rates to be just and reasonable

Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission; Provided, That only public utility service being furnished or rendered by a municipal corporation, or by the operating agencies of any municipal corporation, beyond its corporate limits, shall be subject to regulation and control by the commission as to rates, with the same force, and in like manner, as if such service were rendered by a public utility. 1937, May 28, P.L. 1053, art. III, §301; 1939, March 21, P.L. 10, No. 11, §2.

e. §1142. Tariffs; filing and inspection

Under such regulations as the commission may prescribe, every public utility shall file with the commission, within such time and in such form as the commission may designate, tariffs showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission. The tariffs of any public utility also subject to the jurisdiction of a Federal regulatory body shall correspond, so far as practicable, to the form of those prescribed by such Federal regulatory body. Every public utility shall keep copies of such tariffs open to public inspection under such rules and regulations as the commission may prescribe. 1937 May 28, P.L. 1053, art. III, §302.

f. §1144. Discrimination in rates

No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service. Unless specially authorized by the commission, no public utility shall make, demand, or receive any greater rate in the aggregate for the transportation of passengers or property of the same class, or for the transmission of any message or conversation for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or any greater rate as a through rate than the aggregate of the intermediate rates. Nothing herein contained shall be deemed to prohibit the establishment of reasonable zone or group systems, or classifications of rates or, in the case of common carriers, the issuance of excursion, commutation, or other special tickets, at special rates, or the granting of nontransferable free passes, or passes at a discount to any officer, employee, or pensioner of such common carrier. No rate charged by a municipality for any public utility service rendered or furnished beyond its corporate limits shall be considered unjustly discriminatory solely by reason of the fact that a different rate is charged for a similar service within its corporate limits. 1937, May 28, P.L. 1053, art. III, §304.

g. §1171. Character of Service and Facilities

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable services and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accomodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity

with the regulations and orders of the commission. Subject to the provisions of this act and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility. 1937, May 28, P.L. 1053, art. IV, §401.

h. §1172. Discrimination in Service

No public utility shall, as to service, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to service, either as between localities or as between classes of service, but nothing herein contained shall be deemed to prohibit the establishment of reasonable classifications of service. 1937, May 28, P.L. 1053, art. IV, §402.

i. §1182. Standards of service and facilities

The commission may, after reasonable notice and hearing, upon its own motion or upon complaint, prescribe as to service and facilities, including the crossing of facilities, just and reasonable standards, classifications, regulations, and practices to be furnished, imposed, observed, and followed by any or all public utilities; prescribe adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage, or other condition pertaining to the supply of the service of any and all public utilities; prescribe reasonable regulations for the examination and testing of such service, and for the measurement thereof; prescribe or approve reasonable rules, regulations, specifications, and standards to secure the accuracy of all meters and appliances for measurement; and provide for the examination and testing of any and all appliances used for the measurement of any service of any public utility. 1937, May 28, P.L. 1053, art. IV, §412; 1938, Sp. Sess., Sept. 28,P.L. 44, §1.

j. §1183. Regulation of Service

Whenever the commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the service or facilities of any public utility are unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation of this act, the commission shall determine and prescribe, by regulation or order, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed including all such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accomodation, and convenience of the public, and shall fix the same by its order or regulation. 1137, May 28, P.L. 1053, art. IV, §413.

k. §1211. Mandatory systems of accounts

The commission may, after reasonable notice and hearing, establish systems of accounts (including cost finding procedures) to be kept by public utilities, or may classify public utilities and establish a system of accounts for each class, and prescribe the manner and form in which such accounts shall be kept. Every public utility shall establish such systems of accounting, and shall keep such accounts in the manner and form required by the commission. The accounting system of any public utility also subject to the jurisdiction of a Federal

regulatory body shall correspond, as far as practicable, to the system prescribed by such Federal regulatory body: Provided, That the commission may require any such public utility to keep and maintain supplemental or additional accounts to those required by any such regulatory body. 1937, May 28, P.L. 1053, art. V, §501.

l. §1241. Registration of securities to be issued or assumed

(a) Under such regulations as the commission may prescribe, every public utility, before it shall execute, cause to be authenticated, deliver, or make any change or extension in any term, condition, or date of, any stock certificate or other evidence of equitable interest in itself, or any bond, note, trust certificate, or other evidence of indebtedness of itself, any or all of which acts are hereinafter included in the term "issuance of securities", shall have filed with the commission, and shall have received from the commission, notice of registration of a document to be known as a securities certificate: Provided, That neither (1) the execution, authentication, or delivery of securities to replace identical securities lost, mutilated, or destroyed while in the ownership of a bona fide holder-for-value, who properly indemnifies the public utility, therefor, nor (2) the execution, authentication, or delivery of securities in exchange for the surrender of identical securities, solely for the purpose of registering or facilitating changes in the ownership thereof between bona fide holders-for-value, which surrendered securities are thereupon cancelled, nor (3) the delivery from the treasury of the public utility of securities previously reacquired from bona fide holders-for-value and held alive, shall be deemed an issuance of securities under this subsection: And provided further, That the requirements of this paragraph shall not apply to the issuance of - (1) any evidence of indebtedness, the date of maturity, or which is at a period of less than one year from the date of its execution, (2) any evidence of indebtedness for which no date of maturity is fixed, but which matures upon demand of the holder, (3) any evidence of indebtedness in the nature of a contract between a public utility and a vendor of equipment wherein the public utility promises to pay installments upon the purchase price of equipment acquired, and which is not in the form of an equipment trust certificate or similar instrument readily marketable to the general public.

(b) Under such regulations as the commission may prescribe, every public utility, before it shall assume primary or contingent liability for the payment of any dividends upon any stocks, or of any principal or interest of any indebtedness, created or incurred by any other person or corporation, any or all of which acts are hereinafter included in the term "assumption of securities", shall have filed with the commission, and shall have received from the commission notice of registration of a document to be known as a Securities Certificate: Provided, however, That the requirements of this paragraph shall not apply to an assumption of securities if the commission shall have approved the acquisition of all of the property of the issuing company by the assuming company, as provided in paragraph (e) of section two hundred two of this act. 1937, May 28, P.L. 1053, art. VI, §601; 1938, Sp. Sess., Sept. 28, P.L. 44, §1.

m. §1271. Contracts for services

(a) Within thirty days after the effective date of this act, every public utility having in force any contract with an affiliated interest for the furnishing to such public utility of any management, supervisory, purchasing, construction, engineering, financing, or other services, shall file a copy of such contract, or if oral, a complete statement of the terms and conditions thereof, with the commission.

(b) Every public utility which shall hereafter enter into any such contract, or which shall change any such existing contract, shall file a copy of such contract with the commission within ten days after its execution or change.

(c) The commission shall have authority at any time to investigate every such contract filed in accordance with this section, and, if after reasonable notice and

hearing, it shall determine that the amounts paid or payable thereunder are in excess of the reasonable cost of furnishing the services provided for in the contract, or that such services are not reasonably necessary and proper, it shall order such amounts, in so far as found excessive, to be stricken from the books of account of the public utility as charges to fixed capital, or operating expenses, as the case may be, and shall not consider such amounts in any proceeding. In any proceeding involving such amounts, the burden of proof to show that such amounts are not in excess of the reasonable cost of furnishing such service, and that such services are reasonable and proper, shall be on the public utility. 1937, May 28, P.L. 1053, art. VII, §701.

n. §1341. Administrative authority of commission; regulations

The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistant with the law, as may be necessary or proper in the exercise of its powers or for the performance of its duties under this act. 1937, May 28, P.L. 1053, art. IX, §901.

o. §1342. Commission to enforce act

In addition to any powers hereinbefore expressly enumerated in this act, the commission shall have full power and authority, and it shall be its duty, to enforce, execute, and carry out, by its regulations, orders, or otherwise, all and singular the provisions of this act, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in this act shall not exclude any power which the commission would otherwise have under any of the provisions of this act. 1937, May 28, P.L. 1053, art. IX, §902.

p. §1343. Enforcement proceedings by commission

Whenever the commission shall be of opinion that any person or corporation including a municipal corporation, is violating, or is about to violate, any provisions of this act; or has done, or is about to do, any act, matter, or thing herein prohibited or declared to be unlawful; or has failed, omitted, neglected, or refused, or is about to fail, omit, neglect, or refuse, to perform any duty enjoined upon it by this act; or has failed, omitted, neglected or refused or is about to fail, omit, neglect, or refuse to obey any lawful requirement, regulation, or order made by the commission; or any final judgment, order, or decree made by any court, then and in every case the commission may institute in the court of common pleas of Dauphin County, injunction, mandamus, or other appropriate legal proceedings, to restrain such violations of the provisions of this act, or of the regulations, or orders of the commission, and to enforce obedience thereto; and such court of common pleas is hereby clothed with exclusive jurisdiction throughout the Commonwealth to hear and determine all such actions. No injunction bond shall be required to be filed by the commission. Such persons, corporations, or municipal corporations as the court may deem necessary or proper to be joined as parties, in order to make its judgment, order or writ effective, may be joined as parties. The final judgment in any such action or proceeding shall either dismiss the action or proceeding, or direct that the writ of mandamus or injunction issue or be made permanent as prayed for in the petition, or in such modified or other form as will afford appropriate relief. 1937, May 28, P.L. 1053, art. IX, §903, as amended, 1971, June 3, P.L. -, No. 6, §1 (§509 (a)(115)).

q. §1360. Contracts; power of the commission to vary, reform or revise

The commission shall have power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligations, terms, or conditions of

any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well being of the Commonwealth.

Whenever the commission shall determine, after reasonable notice and hearing, upon its own motion or upon complaint, that any such obligations, terms, or conditions are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well being of the Commonwealth, the commission shall determine and prescribe by findings and order, the just, reasonable, and equitable obligations, terms and conditions of such contract. Such contract, as modified by the order of the commission, shall become effective thirty days after the service of such order upon the parties to such contract. 1937, May 28, P.L. 1053, art. IX, §920.

2. Pa. P.U.C. - Tariff Regulations

a) Section II. PUBLIC NOTICE OF TARIFF CHANGES

1. Unless the Commission otherwise orders, no public utility to which these rules apply shall make any change in any existing and duly established tariff except after sixty (60) days' notice to the public.

2. Each such notice shall plainly state the changes proposed in the tariff then in force, and the date on which the changes will become effective. (See Section III).

b) Section VIII. DISCOUNT FOR PROMPT PAYMENT AND PENALTIES FOR DELAYED PAYMENT OF BILLS

Every public utility that imposes penalties upon its customers for failure to pay bills promptly, or allows its customers discounts for prompt payment of bills, shall provide in its posted and filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed or discounts are allowed. The tariff shall also indicate clearly whether, if bills are paid by mail, the date of the postmark will be considered the date of payment.

3. Pa. P.U.C. - Electric Regulations

Rule 14 - ADJUSTMENT OF BILLS FOR AVERAGE METER ERROR

A. AVERAGE METER ERROR - In meter tests made by the public utility or by the Commission at the request of a customer (Rule 12), the correctness of adjustment of the meter and its performance in service shall be judged by its average error, determined as follows:

(1) If the meter is used to measure a load which is substantially constant the meter shall be tested at such load. The error of the meter at such constant load shall be accepted as the average meter error.

(2) If the meter is used to measure a variable load, the average error shall be obtained by taking one-fifth of the algebraic sum of

(a) One part of the error at light load plus
(b) four parts of the error at heavy load

(3) If, in the opinion of the Commission, another load is more representative of the average operating load, the error of the meter at such average operating load shall be accepted as the average meter error.

B. FAST METERS - If, upon test of any meter is found to have an average meter error of more than two (2%) per cent fast, the public utility shall refund to the customer the overcharge, based upon the corrected meter reading for a period equal to one-half the time elapsed since the last previous test, but not to exceed three (3) months. If the period of registration error can be definitely fixed, the overcharge shall be computed for such period. If the meter has not been tested in accordance with Rule 10, the period for which it has been in service beyond the regular test period shall be added to the three (3) months in computing the refund.

C. SLOW METERS - If, upon test of any meter, the meter is found to have an average meter error of more than two (2%) per cent slow, the public utility may render a bill for the service furnished, but not covered by bills previously rendered, for a period equal to one-half the time elapsed since the past previous test, but not to exceed three (3) months. If the period of registration error can be definitely fixed, the charge may be computed for such period.

D. ACCESS TO METERS - The public utility shall at all reasonable times have access to meters, service lines and other property owned by it on customer's premises, for purposes of maintenance and operation. Neglect or refusal on the part of customers to provide reasonable access to their premises for the above purposes shall be deemed to be sufficient cause for discontinuance of service.

4. Metropolitan Edison Company Electric Tariff
Electric Pa. P.U.C. No. 41

Cause for discontinuance of service:

Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of non payment of bill or violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations, or, without notice, for abuse, fraud, or tampering with the connections, meters or other equipment of Company. Failure by Company to exercise this right shall not be deemed a waiver thereof.

Should the Company's service be terminated for any cause aforesaid, the minimum charge for the unexpired portion of the term shall become due and payable immediately, provided, however, that if satisfactory arrangements are subsequently made by Customer for reconnection of the service (in which event, a reconnection charge of not less than $1.00 must be paid) the immediate payment of the minimum charge for the unexpired portion of the contract term may be waived or modified as the circumstances indicate would be just and reasonable.

Company may refuse its service to, or remove its service from, any installation which, in the judgment of Company, will injuriously affect the operation of Company's system or its service to other Customers.
Issued April 30, 1971. Effective June 30, 1971.

5. Kansas Statutes Annotated

K.S.A. §66-101

"Power, authority and jurisdiction. The state corporation commission is given full power, authority and jurisdiction to supervise and control the public utilities, including radio, common carriers, and all common carriers, as hereinafter defined, doing business in the state of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction."